UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/530
23 October 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 530

Case No. 565: SALINAS

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Ahmed Osman, Vice-President; Mr. Arnold Kean;

Whereas at the request of Carlos Salinas, a former staff member of the Economic Commission for Latin America and the Caribbean, hereinafter called ECLAC, the Tribunal extended to 31 December 1990 the time-limit for the filing of an application to the Tribunal;

Whereas, on 18 October 1990, the Applicant filed an application containing the following pleas:

"II. PLEAS

The Tribunal is respectfully requested to:

1. Rescind the decision of the Secretary-General to reject the unanimous recommendation of the Joint Appeals Board contained in its report No. 610 of 5 November 1987, paragraph [44], namely,

'that the appellant should be reinstated in his post or in a post of similar grade.'

or, in other words, the Secretary-General's decision to terminate the Applicant's permanent appointment;

2. Decide that the Secretary-General's decision to terminate Applicant's permanent appointment, in spite of the unanimous Joint Appeals Board recommendation, contradicts the assurances that the Secretary-General

would accept all unanimous reports of the Board provided they do not impinge on major questions of law or principals;

The Internal Rules of Procedure of the Joint Appeals Board at Headquarters, adopted on 11 January 1989 (...), use the same wording in paragraph 16 and add:

'if he (the Secretary-General) decides not to accept the report of the Board, he sets out the reasons for its rejection in a letter to the Appellant.'

3. Order the implementation of the Joint Appeals Board's unanimous recommendation contained in paragraph 44 of its report and consequently, the immediate reinstatement of the Applicant as of 5 November 1987, especially since Applicant has been unemployed for almost four years.

4. Alternatively, in lieu of specific performance, order the Secretary-General to pay instead the Applicant, as compensation, the sum equivalent to three years net base salary."

Whereas the Respondent filed his answer on 16 April 1991;

Whereas the Applicant filed written observations on 31 July 1991;

Whereas the facts in the case are as follows:

The Applicant, who had entered the service of ECLAC on 18 April 1963, received a permanent appointment on 1 March 1974 as a Mimeograph Operator at the G-3 level in the Documents Reproduction Section.

In 1983 and 1984 the Applicant met with serious financial difficulties and requested salary advances from the Organization. On 16 October 1984, in a memorandum addressed to the Director of the Division of Administration of ECLAC, he expressed his agreement to a termination of his permanent appointment under the last paragraph of staff regulation 9.1(a) and stated that he would not contest the decision of the Secretary-General should the latter decide to terminate the appointment under that paragraph. On 2 January 1985 the Office of Personnel Services at

Headquarters cabled the Chief of the Personnel Section of ECLAC that it could no longer support the agreed termination of the Applicant "for indebtedness". On 8 January 1985 the Director of the Division of Administration of ECLAC informed the Applicant that the Secretary-General had decided not to accept his request for an agreed termination of his appointment.

On 26 March 1985, however, the Chief of the Personnel Section of ECLAC informed the Assistant Secretary-General for Personnel Services that the Executive Secretary of ECLAC as well as the Division of Administration wished to terminate the Applicant's contract in accordance with the last paragraph of staff regulation 9.1(a), and he requested the Assistant Secretary-General's approval for such action. The Chief of the Personnel Section of ECLAC reiterated his request on 28 June 1985. It appears that in October 1985, in the presence of a Senior Personnel Assistant, the Applicant verbally requested the Chief of the Personnel Section of ECLAC to follow up on his agreed termination since it was imperative that he receive the termination indemnities involved as soon as possible. On 12 December 1985, in a memorandum addressed to the Secretary-General through the Under-Secretary-General for Administration and Management and the Legal Counsel, the Assistant Secretary-General for Personnel Services recommended the Applicant's termination under the last paragraph of staff regulation 9.1(a). On 27 December 1985 the Under-Secretary-General for Administration and Management approved the recommendation on behalf of the Secretary-general. The decision was conveyed to the Applicant by cable and by the following letter dated 2 January 1986 from the Personnel Officer for ECLAC at Headquarters:

> "This is to inform you that the Secretary-General, noting that you have indicated in writing that you would be agreeable to the termination of your permanent appointment, had decided to terminate your permanent appointment in accordance with the last paragraph of staff regulation 9.1(a). The termination will take effect on 10 January 1986 COB [close of

business]. This letter constitutes formal motive of termination of your appointment.

You will receive three months' salary in lieu of notice under staff rule 109.3(c).

..."

On 7 January 1986 the Applicant sent the following cable to the Assistant Secretary-General for Personnel Services:

"RE YOUR CABLE 0181 REGARDING AGREED TERMINATION TO BE EFFECTIVE TEN JANUARY 1986. AAA IN OCTOBER 1984 UNDER EXTREME PRESSURE DUE TO ECONOMIC AND PERSONAL PROBLEMS EYE REQUESTED THAT MY APPOINTMENT BE TERMINATED AND EYE SIGNED A MEMORANDUM IN THAT RESPECT. BBB SINCE THEN AND DURING ALL OF 1985 EYE DID NOT RECEIVE ANY INFORMATION REGARDING MY REQUEST. WITH GREAT EFFORTS AND WITH THE HELP OF MY FELLOW STAFF MEMBERS EYE HAVE BEEN ABLE TO FACE AND RESOLVE THE SERIOUS PROBLEMS THAT EYE THEN HAD. AS A RESULT BY THE END OF 1985 EYE HAD SOLVED MY PROBLEMS AND UNDERSTOOD THAT MY REQUEST WAS NO LONGER VALID IN VIEW OF THE LACK OF RESPONSE. CCC MUCH TO MY SURPRISE EYE RECEIVED THE AFORE-MENTIONED CABLE AND THEREFORE IN VIEW OF THE NEW CIRCUMSTANCES EYE REQUEST THAT YOU RECONSIDER AND ANNUL MY REQUEST AND THE DECISION OF THE SECRETARY-GENERAL."

Having been separated from service on 10 January 1986, the Applicant, on 14 May 1986, sent a letter to the Secretary-General under staff rule 111.2(a), requesting reconsideration of his case and reinstatement in the service of ECLAC. On 9 July 1986 the Assistant Secretary-General for Personnel Services informed the Applicant that he could see no grounds for reconsidering the challenged decision and, on 24 September 1986, the Applicant lodged an appeal with the Joint Appeals Board.

The Joint Appeals Board submitted its report on 5 November 1987. The Board's conclusions and recommendation read as follows:

"Conclusions and Recommendation

43. The Panel concludes that when it became clear, before the appellant's separation from the service,

that he was no longer in agreement with an agreed termination of his permanent appointment, the Administration should, in equity, have reviewed the circumstances of the case before proceeding to separate him.

44. Accordingly the Panel recommends that the appellant should be reinstated in his post or in a post of a similar grade."

Following the recommendation of the Joint Appeals Board, the Administration, in consultation with the Applicant, examined the possibility of reinstating him taking into consideration such factors as his medical condition and his ability to reimburse the payments made to him upon separation. On 9 June 1988, however, the Under-Secretary-General for Administration and Management informed the Applicant that:

"...

The Secretary-General, having re-examined your case in the light of the Board's report, has decided to maintain the original decision to terminate your appointment, effective 10 January 1986, under the last paragraph of staff regulation 9.1(a). As noted by the Board in paragraphs 5 and 8 of its report, you had expressed your written agreement to such termination on 16 October 1984 and as late as October 1985 and you did not withdraw your consent prior to notification of that action. In this connection I should like to advise you that the Secretary-General is under no legal obligation to reinstate you following the termination of your appointment under staff regulation 9.1(a). After consultations with yourself, your designated counsel, and ECLAC, it has, moreover, emerged that the implementation of the Board's recommendation would not be feasible for reasons of practicality.

However, in view of the Secretary-General's policy of accepting unanimous Board recommendations wherever possible, and taking into account the entire circumstances of your case, he has decided to grant you six months net base salary at G-3, Step XI, at the rate in effect upon the termination of your appointment under the last paragraph of staff

regulation 9.1(a), in final settlement of your case, and to take no further action on the matter.

..."

On 18 October 1990 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Secretary-General's explanation for rejecting the Joint Appeals Board report is misleading.

2. The Secretary-General cannot introduce before the Tribunal issues which were not submitted to the Joint Appeals Board.

3. The Secretary-General committed himself to implement unanimous recommendations of the Joint Appeals Board.

Whereas the Respondent's principal contentions are:

1. Acceptance by the Secretary-General of the Applicant's request for an agreed termination created a contract binding on the parties, at the latest upon communication of that acceptance to the Applicant.

2. The Secretary-General is not bound to accept unanimous recommendations of a Joint Appeals Board Panel.

The Tribunal, having deliberated from 17 to 23 October 1991, now pronounces the following judgement:

I. The Applicant challenges the decision of the Respondent to terminate his permanent appointment under the last paragraph of staff regulation 9.1(a). He claims that although there was originally a written proposal on his part for an agreed termination, this proposal was no longer in effect when he was finally terminated. The Respondent claims that the Applicant having proposed in writing an agreed termination and having undertaken not to contest a decision to that effect, the

Respondent's decision is in full accord with the last paragraph of staff regulation 9.1(a).

II. The Tribunal notes the conclusion of the Joint Appeals Board that since the Applicant was no longer in agreement with an agreed termination of his permanent appointment, the Administration should, in equity, have reviewed the circumstances of the case before proceeding to separate him. The Board recommended that the Applicant should be reinstated in his post or in a post of a similar grade.

III. The rule applicable in this case is the last paragraph of staff regulation 9.1(a) which provides that:

> "Finally, the Secretary-General may terminate the appointment of a staff member who holds a permanent appointment, if such action would be in the interest of the good administration of the Organization and in accordance with the standards of the Charter, provided that the action is not contested by the staff member concerned."

IV. The Tribunal observes that the provision quoted above has vested the Secretary-General with a discretionary power to terminate under certain conditions the appointment of a staff member who holds a permanent appointment. It has prescribed the conditions of validity of such a decision. Three conditions must be fulfilled:

(a) The decision would be in the interest of the good administration of the Organization;

(b) It would be in accordance with the standards of the Charter;

(c) It is not contested by the staff member concerned.

V. Although the text of the provision suggests that the Secretary-General takes the initiative in the process of such a termination, the Tribunal observes that, in this particular case, it was the staff member who took the initiative. In his

memorandum of 16 October 1984 addressed to the Director of the Division of Administration, the Applicant proposed a termination of his permanent appointment under the last paragraph of staff regulation 9.1(a). The Applicant stated that he would not contest the decision of the Secretary-General to terminate his permanent appointment should the latter take such a decision under the last paragraph of staff regulation 9.1(a). The Applicant was prompted to make such a proposal by a specific reason of his own, namely, the pressure of his financial problems.

VI. The Applicant expected at the time that the Secretary-General would be in a position to accept his proposal for an agreed termination.

VII. The Tribunal notes that the reaction of the Secretary-General to the Applicant's initiative was very categorical and was crucial because in fact it sealed the fate of both his proposal for an agreed termination and his offer of no contest presented on 16 October 1984.

This reaction was negative and is found in two documents. In a cable dated 2 January 1985, the Office of Personnel Services at Headquarters informed the Chief of the Personnel Section of ECLAC that it could no longer support the termination of the Applicant's appointment because it was grounded on his indebtedness. On 8 January 1985, the Applicant was informed in writing that the Secretary-General had decided not to accept the request for an agreed termination of the Applicant's appointment.

VIII. In the view of the Tribunal, it is clear from this categorical rejection that the proposal for an agreed termination made by the Applicant in his memorandum of 16 October 1984, and his offer of no contest, were not met with a corresponding acceptance of the other party. Therefore the Applicant's unilateral offer became legally non-existent. Contrary to the

Respondent's contention, the Applicant did not have to withdraw or cancel an offer which had become extinct by reason of its having been rejected.

IX. The Tribunal finds that the process of agreed termination initiated by the Applicant and rejected by the Respondent had come to an end. If later the Respondent changed his mind and wished to pursue such an agreed termination, he had to start a new process. In that case, the Respondent had to see to it that all the conditions under the last paragraph of staff regulation 9.1(a) were fulfilled.

X. The Tribunal notes that the Respondent seems to have embarked on a process of his own to terminate the permanent appointment of the Applicant.

One year after being notified, on 8 January 1985, of the Respondent's decision not to accept his offer of agreed termination, the Applicant was informed, on 2 January 1986, that the Secretary-General had decided to terminate his appointment in accordance with the last paragraph of staff regulation 9.1(a).

XI. The Tribunal will now examine if that decision met all the requirements stated in the last paragraph of staff regulation 9.1(a).

XII. The Tribunal observes that, three months after the abortion of the process originally initiated by the Applicant for his own specific reason, Mr. Cure, Chief of the Personnel Section of ECLAC, sent on 26 March 1985 a memorandum to the Assistant Secretary-General for Personnel Services which contains three points relating to the process of termination of the Applicant's permanent appointment. The first two points are:

(1) The wish expressed by the Executive Secretary of ECLAC as well as the Division of Administration to terminate the contract of the Applicant in accordance with the last paragraph of staff regulation 9.1(a);

(2) The reasons for such an initiative given by Mr. Cure in addition to the original reason of the Applicant:

(a) There had been a noted decline in the Applicant's performance;

(b) His health had deteriorated;

(c) He had been involved in a disciplinary case going back to 1971;

(d) He had been given a letter of censure for irregularities in submission of medical claims.

The third point in Mr. Cure's memorandum was a recommendation that it would be in the interest of good administration to terminate the permanent appointment of the Applicant.

XIII. In his memorandum of 12 December 1985 addressed to the Secretary-General, the Assistant Secretary-General for Personnel Services, acting upon Mr. Cure's memorandum of 26 March 1985, endorsed the conclusion of Mr. Cure that separation would be in the interest of good administration and recommended approval of the Applicant's termination under the last paragraph of staff regulation 9.1(a). On 27 December 1985, the Under-Secretary-General for Administration and Management agreed to this action on behalf of the Secretary-General and on 2 January 1986 the Applicant was notified accordingly.

XIV. The Tribunal notes that throughout that new process initiated by the Respondent to seek termination of the Applicant's permanent appointment, the Administration relied on the Applicant's offer of 16 October 1984 which the Tribunal has found to have become extinct when it was rejected by the Respondent on 2 January 1985. Therefore the Respondent could not invoke such an offer. When in January 1986 - 14 months after the Applicant's submission of his formal offer to accept an agreed termination - the decision to terminate his appointment was communicated to him, the Applicant immediately exercised his right to contest the decision and asked that the decision be annulled.

XV. Since the contested decision was erroneously based on a no longer existing offer of the Applicant, the Tribunal concludes that the decision is not a proper application of the last paragraph of staff regulation 9.1(a) and should therefore be rescinded.

XVI. The Tribunal considers that reinstatement of the Applicant would not be practicable in the circumstances of the case. The Tribunal has previously held that where the parties cannot be restored to the status quo ante, compensation in lieu of specific performance may be an adequate and proper relief. On the basis of all the evidence in the file, the Tribunal assesses the injury sustained by the Applicant at an amount equal to two years of his net base salary at the time of termination.

XVII. For the foregoing reasons, the Tribunal:

1. Orders the Respondent to pay to the Applicant two years of his net base salary at the time of termination;

2. Rejects all other pleas of the Applicant.

(Signatures)

Roger PINTO
President

Ahmed OSMAN
Vice-President

Arnold KEAN
Member

New York, 23 October 1991

Jean HARDY
Acting Executive Secretary